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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1231

MANUEL O. DELACRUZ,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent

PETITIONER'S REJOINDER TO RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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TO SAID HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A comparison of the Application and Reply demonstrate the following:

1. Issue is not joined to the first question presented. Petitioner presents a question of law as to (1) the railroad's conduct precluding contributory negligence and (2) the Petitioner's conduct could not legally contribute to the accident.

2. Issue is not joined as to the second question presented. Petitioner complains *not* of error in the charge on damages, but of the Court again reducing the damages the jury awarded Petitioner, after telling the jury to do so.

3. Respondent would persuade the Court that Petitioner presents only disputed fact issues. When the printed record is before this Court on the merits, we shall fully brief these matters to show that respondent's efforts inject irrelevant minutae of testimony which we now respond to in capsulated form:

A. Respondent presents irrelevant evidence as to a "normal" operation, when the undisputed facts showed an abnormal operation where this petitioner had never worked in this pit on this track in 16 years with the company.

B. Each repair track had its own safety derail and locks; thus, operation on track 2 would not alert one to danger on track 1.

C. Petitioner worked in a separate department from the carmen and was not expertise in their customs or warning system.

D. The statement in the *Reply* (p. 14), "In spite of the fact that plaintiff knew that the switching crew would normally expect that there would be no machinist working on rip track No. 1, the evidence was undisputed that plaintiff had not complied with the blue flag rule" is indicative of the non-joinder because on this day they were not supposed to! (T. 202)

Furthermore, the statement ". . . that plaintiff was well aware of the fact that the switch-

ing crew was moving cars in and out of the repair tracks"[1] again begs the question because for the switching crew too have come upon track No. 1 *was no evidence that the switch crew was not fully aware of the disabled engine and the workmen under it and taking due care to avoid it, as Petitioner had been advised. There was no evidence of a rule or order that prohibited a switch crew from coming upon the repair tracks while repairs were being made and indeed this often happened.* To the contrary, word "is sent out that a *certain track is being opened* and a move will be made in that area, and everybody stay in the clear during that period of time." (T. 739). *No such warning was given Petitioner that track #1 was being opened!*

4. Beginning on page 20 ff. Respondent does respond to the *Paluch* case for the first time. And the Railroad seems to present four arguments, which we understand to be as follows:

A. There was no representation by the supervisor that the work area was safe because the jury need not have believed the Petitioner. But the evidence is undisputed to the contrary even if Petitioner be not believed. Impartial and unimpeached witness Jenkins testified to the content of the same warning (T. 525, 533-

[1] There was no such admission as to track 1, which had its own derail protection.

534). Witness Bixenmann heard Supervisor Patterson say the yardmaster knew a crew was working on Rip 1 (T. 572) and the yardmaster has a duty to notify the switch crew when machinists are working on Rip 1 (T. 613); and switchman Daniels admitted that the switch crew ". . . knew you was down there and we had orders to that effect, and we seen you down there before." (T. 540). Respondent's supervisor and agent, Patterson, was not called by the Railroad to testify, thereby raising a presumption that he would not dispute what was said. *Mallory & Co. v. N.L.R.B.*, 400 F.(2) 956 at p. 959 (C.A. 7th Cir. 1968). This elevates facts to the plateau of being undisputed.

While a plaintiff need not be believed by a jury, absent corroboration, because of his interest; with corroboration he and the corroborating evidence is entitled to be believed. *Continental Nat. Bank v. Conner,* 147 T. 218, 214 S.W. 2d 928; *Ex parte Rohleder,* 424 S.W. 2d 891; *Hideburgh v. Palvio,* 274 S.W. 2d 94, N.R.E. It is the height of something or other to assert that what plaintiff swears to is impeached by a prior statement which does not advert to the questioned testimony at all. (See Reply bottom p. 20-top p. 21). This Petitioner under any rule of construction was not an impeached witness.

B. Secondly, Respondent seems to say that

Paluch v. Erie & Lackawanna R.R. Co. (3rd Cir.) can be distinguished (but p. 23 doesn't seem to like the one used by J. Aldrich in his opinion), and would distinguish it as follows:

(1) Respondent finds that in *Paluch* the plaintiff was told by his foreman that the pole was safe, when it wasn't, but fails to draw the parallel. *Here* the foreman said "you fellows are safe, everything has been taken care of," when it wasn't.

(2) Respondent finds in *Paluch* that the plaintiff was totally inexperienced in climbing poles, and that Petitioner here was an experienced mechanic. But in *Paluch* the plaintiff didn't get hurt by his inexperience in climbing the pole, but in relying on the foreman that the pole was safe.

By parallel (although Respondent failed to note it), petitioner didn't get hurt from going in the pit and doing his work, but in relying on the foreman that the work area was safe. In this respect petitioner also was inexperienced, never having worked there before.

(3) Respondent finds in *Paluch* a distinction because the ground of negligence contended for by the Railroad that Paluch was negligent in failing to find the pole

defective. Somehow this is different from a contention in this case by the Railroad that petitioner did not find the work area unsafe, or to be more accurate "in placing himself in a hazardous position."

C. Thirdly, Respondent seems to be saying: If there was a representation of safety made to Petitioner by the Railroad, which would normally preclude Petitioner's negligent conduct, it should be disregarded since the jury found plaintiff contributorily negligent anyway, and rules of law shouldn't apply.

D. Finally, Respondent infers that a railroad's negligence may never be the sole immediate cause of an injury because the employee was *there* to be injured. Q.E.D., since the plaintiff was *there* and was injured, the fact that his earlier conduct was irrelevant, does not excuse him. But this is not the lesson of *Lavender v. Kurn,* 327 U.S. 645, 653, or *Paluch.* To the contrary, the rule is still that there must be legal causation. Petitioner's blue flag would have done no more to stop this train than the failure of the brake light to come on would have avoided a rear-end collision in *Dobson v. Gulf Supply Co.,* 399 S.W. 2d 882, n.r.e., when defendant there saw plaintiff's car stopping and could not himself stop in time.

The *Paluch* case cannot be distinguished from this case.

CONCLUSION

This writ seeks to bring before the Court a matter of great importance to the jurisprudence as it applies to F.E.L.A. cases.

Indeed, the fact that the railroad company could not join issue with Petitioner, on his application, argues strongly for a summary reversal to square the law of the Fifth Circuit with that of the 3rd,[2] and that justice may be done this injured Petitioner.

Respectfully submitted,

MULLINAX, WELLS, MAUZY & COLLINS

By .....
Otto B. Mullinax

By .....
L. N. D. Wells, Jr.

Attorneys for Petitioner

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[2] Not Sixth Circuit as Respondent asserts p. 24.

CERTIFICATE OF SERVICE

IT IS CERTIFIED that on the ..... day of May, 1969, a copy of the foregoing Petitioner's Rejoinder to Respondent's Reply to Petition for Writ of Certiorari was mailed to Joe Bruce Cunningham, 1905 Continental Life Building, Fort Worth, Texas 76102, Attorney for Respondent.

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Otto B. Mullinax